

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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November 18, 1994

Michael T. Massey
Piping Industry Progress
and Education Trust Fund
501 Shatto Place, Suite 405
Los Angeles, California 90020

Re: Public Works Case No. 94-027
Groundwater Remediation Facilities,
Burbank Operable Unit, California Superfund Project

Dear Mr. Massey:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above project under the public works laws and is made pursuant to 8 California Code of Regulations ("CCR") § 16001(a) and § 16301.

Based on a review of the documents submitted and an analysis of the relevant facts as presented and the applicable law, I have determined that the portion of the above referenced project constructed by Lockheed Corporation ("Lockheed") is not a "public works" within the meaning of Labor Code § 1720 *et seq.*¹ However, the work being done by the City of Burbank ("City") is a "public works" within the meaning of the Labor Code.

The project in question is the result of a lawsuit filed in the United States District Court for the Central District of California, by the United States Environmental Protection Agency ("EPA") against Lockheed, the City, and Weber Aircraft, Inc. ("Weber"), United States v. Lockheed Corporation, et al., Civil Action No. 91-4527 MRP (Tx). The suit was filed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("CERCLA"). The suit alleged that the defendants were responsible for past, present, and/or potential migrations of "hazardous substances" into the ground water in an area designated as the Burbank Operable Unit Site. The litigation was settled by means of a Consent Decree approved by the Court on March 25, 1992. Lockheed agreed in the decree to construct a water treatment facility to process the contaminated ground water.

¹ All subsequent references to code sections are to the California Labor Code unless otherwise indicated.

Pursuant to the decree, Lockheed is responsible for constructing the water treatment plant, extraction and injection wells, and all other necessary facilities up to a specified "Point of Delivery." Lockheed is responsible for the cost of constructing this portion of the project.² The construction contract is between Lockheed and a private contractor. In addition to constructing the plant, Lockheed will be responsible for operating and maintaining it for two years after the completion of the project. Because the work to be done by Lockheed is not to be paid for in whole or in part out of public funds, this work is not a "public works" within the meaning of § 1720(a).

Beyond the "Point of Delivery," the City is required to construct certain facilities for handling the treated water. These include a disinfection facility, a regulating reservoir designated as the Valley Forebay Facility, a booster station, and all other facilities necessary to transport the water from the Point of Delivery, through the aforementioned facilities, to a designated Point of Interconnection.³ The contract for this construction will be awarded and administered by the City. The decree requires Lockheed to establish a trust fund in the amount of \$200,000, from which the City may be reimbursed to that amount for costs incurred by it in designing and constructing some of the facilities for which it is responsible. Because the funds received by the City from the trust fund are deposited in public coffers, they constitute "public funds" within the meaning of § 1720(a). Moreover, it appears that the City will also be required to pay out of its existing funds the costs of the construction of the facilities that exceed the amount provided by the Lockheed trust. Thus, the construction work to be performed under contract with the City is a "public works" within the meaning of the Labor Code.

Additionally, the decree makes the City responsible for the operation and maintenance, for specified periods, of the facilities it constructs, and for the operation and routine maintenance of additional facilities for which the responsibility for construction was not agreed upon.⁴ Ongoing operational work is not subject to prevailing wage requirements. However, under § 1771, maintenance is work for which prevailing wages must be paid. 8 CCR § 16000 defines maintenance, in pertinent part, as "(1) routine, recurring and usual work for the preservation . . . and keeping of any publicly owned or operated facility

² The decree also requires Weber Aircraft to establish a trust fund in the amount of \$3,750,000 to partially fund the work to be done by Lockheed.

³ The decree contemplates the construction of certain additional facilities, including blending facilities, from the Point of Interconnection to the Point of Connection with the Metropolitan Water District (MWD). However, the decree does not assign responsibility for these facilities, and provides that EPA intends to seek to have this work done through enforcement actions or settlements with potentially responsible parties, which may include the Settling Defendants.

⁴ See footnote 3 above.

(plant, building, structure, ground facility, utility system or any real property) for its intended purpose in a safe and continually usable condition for which it has been designed, improved, constructed, altered, or repaired." (This definition excludes janitorial or custodial services of a routine, recurring or usual nature, as well as security services.) Any work done under contract with the City that falls within the above definition of maintenance would be public works subject to prevailing wage requirements.⁵

The decree recites that Burbank is a charter city. The prevailing wage law, a general law, does not apply to the public works projects of a charter city, as long as the projects in question are within the realm of "municipal affairs." Vial v. City of San Diego (1981) 121 Cal.App.3d 346, 348, 175 Cal.Rptr. 647. Generally, the construction and operation of municipal water facilities with municipal funds and independent of state or federal involvement and control are deemed to be municipal affairs. Smith v. City of Riverside (1973) 34 Cal.App.3d 529, 110 Cal.Rptr. 67; Wehrle v. Board of Water and Power Commissioners of the City of Los Angeles (1930) 211 Cal. 70; Marin Water and Power Company v. Town of Sausalito (1914) 168 Cal. 587; City of South Pasadena v. Pasadena Land and Water Company (1908) 152 Cal. 579, 93 Pac. 490.

However, where an outside entity has substantial involvement in and control of a project, it may be deemed a matter of statewide concern to which prevailing wage obligations will attach. In Southern California Roads Co. v. McGuire (1934) 2 Cal.2d 115, the California Supreme Court considered the following factors in determining whether a project was a municipal affair subject to the charter city exemption: (1) the source of the funds; (2) the nature and geographic scope of the project; and (3) the extent of state involvement in the project. The court found the project to be a matter of statewide concern because it involved a secondary state highway, was paid for by the state, and was subject to state oversight.

In a recent administrative appeal the Director of Industrial Relations held that a city waterline project that was funded by the state and entailed substantial state involvement and control, was subject to prevailing wage requirements.⁶ That decision was based in part upon the declarations and findings set forth in the state bond law (Cal. Water Code § 13451), which established the following statewide purposes of the law: The provision of a clean water supply essential to public health, safety and welfare; the protection of state water resources from pollution; and the conservation of state water resources.

⁵ PW Case No. 92-029, City of Redlands/Honeywell Corporation (May 31, 1994)

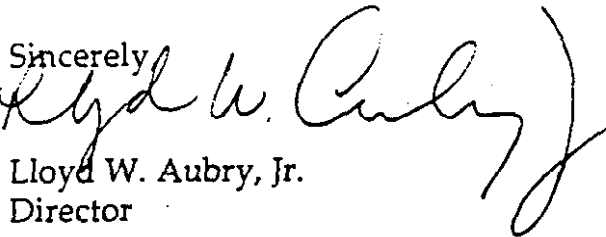
⁶ PW Case No. 93-029, City of Big Bear Waterline Reconstruction Project (October 21, 1994)

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In this case, a basis of the consent decree is the recognition that the alleged "past, present and/or potential migrations of hazardous substances constitute actual and/or threatened releases" into the environment, within the meaning of CERCLA. A project such as this, whose goal is the remediation of environmental hazards, the scope of which exceeds municipal boundaries, represents more than a municipal concern. While there does not appear to be any state funding or involvement in the project, there is substantial federal involvement and control. The consent decree settles litigation brought by the EPA alleging violation of federal environmental laws. The decree and the statement of work and work schedules attached thereto provide for EPA review, comment and approval of each task in the pre-design, design, construction, and implementation phases of the project. In view of these facts, the project is not within the realm of "municipal affairs," and the construction and maintenance work done under contract or subcontract for the City is subject to prevailing wage requirements.

All interested parties are advised that 8 CCR § 16002.5 provides an appeal process regarding coverage determinations. Under that regulation, any interested party may file with the Director an appeal within thirty (30) days of the issuance of the coverage determination. 8 CCR § 16000 defines "interested party" to include contractors, subcontractors, workers, labor organizations, awarding bodies or representatives of any of these entities. The notice of appeal is required to state the full factual and legal ground upon which the determination is appealed, and whether a hearing is desired. A final administrative determination on appeal is subject to judicial review by way of writ pursuant to the Code of Civil Procedure.

Sincerely,



Lloyd W. Aubry, Jr.
Director

cc: R.W. Stranberg, Chief Deputy Director
Victoria Bradshaw, Labor Commissioner
Dorothy Vuksich, Chief, DLSR
Rita Tsuda, Acting Chief, DAS
Vanessa L. Holton, Senior Counsel, OD-Legal
Pete Sowa, System Operations Administrator, Lockheed
City of Burbank Purchasing Dept.